No. 14-114

In The
Supreme Court of the United States

DAVID KING, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that separation of powers is at the heart of the U.S. Constitution.

[1] Pursuant to Supreme Court Rule 37.3, the undersigned certifies that all parties consent to the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Since its creation in 1977, MSLF has sought to preserve the separation of powers by ensuring that executive agencies do not exceed the authority granted to them by Congress. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (amicus curiae); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (amicus curiae); *Rapanos v. United States*, 547 U.S. 715 (2006) (amicus curiae); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997) (represented Plaintiffs). MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding the issue before the Court.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Fourth Circuit because the plain language of the ACA provides that only individuals who are enrolled through a State-established Exchange are eligible for tax credits. The ACA authorizes tax credits to individuals whose household income is less than 400% of the poverty line and who are enrolled through an "Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act. " 26 U.S.C. § 36B(c)(2)(A)(i). The Internal Revenue Service ("IRS"), however, promulgated regulations that authorize tax credits to individuals who are enrolled through either a State-established Exchange or the federal Exchange established by the Department of Health and Human Services ("HHS").

26 C.F.R. § 1.36B-1(k); 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20.

Applying traditional canons of statutory construction, the intent of Congress is unambiguous. The ACA only uses the term "established by the state" when referring to State-established Exchanges. 26 U.S.C. § 36B. When the Act refers to both the federal Exchange and State-established Exchanges, it uses the term "Exchange established under this Act." 42 U.S.C. § 18032(d)(3)(D)(i)(II). Furthermore, previous versions of the bill provided for tax credits to be extended to those enrolled through the federal Exchange, but Congress removed that language before passing the ACA. Finally, the legislative history does not indicate that the clear meaning of the text is at odds with the purpose of the bill. In fact, it is likely that Congress did not extend tax credits to individuals enrolled through the federal Exchange to provide an incentive to States to establish Exchanges.

Even if the statutory text were ambiguous, there is no indication that Congress intended to delegate, explicitly or implicitly, to the IRS the authority to decide who is eligible for tax credits. Congress traditionally delegates authority to agencies when a policy decision requires special expertise. Congress does not, however, traditionally delegate authority on major policy decisions. In this case, the issue of tax credit eligibility is a major policy decision that does not require any particular agency expertise. Therefore, it is unlikely that Congress intended to delegate the determination to the IRS. Accordingly, no deference

should be accorded to the IRS's interpretation, and instead this Court should give the statute its plain meaning.

Finally, this Court must ensure that an executive agency does not rewrite the legislation it is purportedly administering because doing so would threaten the proper balance of power between the three branches of government. The Constitution requires that each branch of the government exercise a different, specialized power. Therefore, an executive agency cannot usurp either Congress's legislative power or this Court's judicial power. If this Court defers to the IRS's interpretation of the ACA, it would allow the agency to usurp both.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACA DOES NOT AUTHORIZE THE IRS TO EXTEND TAX CREDITS TO INDIVIDUALS WHO ARE ENROLLED THROUGH THE FEDERAL EXCHANGE.

This Court should reverse the decision of the Fourth Circuit because the unambiguous language of the ACA only authorizes the IRS to extend tax credits to individuals enrolled through State-established exchanges. When reviewing an agency construction of a statute a Court must determine whether "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If, after "employing

traditional tools of statutory construction," a court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

The foremost canon of statutory construction is that the plain language of the statute controls the Court's interpretation. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (A court's inquiry into the meaning of a statute begins and ends with the language of the statute when "the statute's language is plain. . "). Under this canon, it is clear that the ACA does not authorize the IRS to extend tax credits to individuals enrolled through the federal Exchange. Section 1311 of the ACA provides, *inter alia*, that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an "Exchange") for the State. " 42 U.S.C. § 18031(b). In the event that a state does not establish an Exchange, Section 1321 of the ACA provides that the Secretary of HHS "shall establish and operate such Exchange *within* the State." 42 U.S.C. § 18041(c). Although Congress authorized HHS to establish a federal exchange, it only extended tax credits to individuals enrolled in an "*Exchange established by the State under section 1311* of the Patient Protection and Affordable Care Act. " 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). The plain language of the statute only authorizes tax credits to individuals enrolled through a State-established Exchange.

Moreover, Congress expressly referenced section 1311, which provides that States shall establish Exchanges, and did not reference section 1321, that provides for the federal Exchange. Under the canon *expressio unius est exclusio alterius*, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen v. Harris Cnty.*, 529 U.S. 576, 583 (2000) (quoting *Raleigh & Gaston R. Co. v. Reid*, 13 Wall. 269, 270, 20 L.Ed. 570 (U.S. 1872)). Therefore, because Congress limited tax credits to individuals enrolled in an exchange "established by the state under section 1311," it denied tax credits to individuals enrolled in the federal Exchange.

In addition, the ACA defines "State" as "each of the 50 States and the District of Columbia." 42 U.S.C. § 18024(d). It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 36 (1992). The IRS regulations, however, eliminate the words "established by the State under section 1311 of the Patient Protection and Affordable Care Act" from the statute. Because the challenged regulations violate the plain language of the ACA, they must be held unlawful and set aside. 5 U.S.C. § 706(2); *Chevron*, 467 U.S. at 842-43 (When the intent of Congress is clear, court "must give effect to the unambiguously expressed intent of Congress.").

Other canons of statutory construction further demonstrate that Congress intended to only extend tax credits to those enrolled through State-established Exchanges. When interpreting a statute,

"differing language" in "two subsections" of a law should not be given "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983). The ACA uses a different term when it refers to State-established Exchanges and the federal Exchange collectively. In Section 1312 of the Act, Congress required its members and their staff to enroll in a plan either created by the Act or an "Exchange established under this Act." 42 U.S.C. § 18032(d)(3)(D)(i)(II). An "Exchange established under this Act" refers to both an Exchange "established by the State under section 1311" and the federal Exchange established under Section 1321. This language shows that there is a difference between an "Exchange established under this Act," which includes the federal Exchange, and in Exchange "established by the State under section 1311. " If Congress intended to extend tax credits to individuals enrolled through the federal Exchange, it would have used the language referring to the Exchanges collectively, i.e., an "Exchange established under this Act."

Similarly, the ACA provides that a U.S. territory that "elects . to establish an Exchange shall be treated as a State." 42 U.S.C. § 18043(a)(1). This language arguably overrides the definition of "State" because it allows a territory to be treated as a State for the purpose of the Act. Congress, however, did not include language authorizing the federal Exchange to be treated as a State when HHS established an exchange. *See* 42 U.S.C. § 18041. This absence of language is further evidence that Congress did not extend tax credits to those enrolled in the federal

Exchange. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

That Congress did not intend for State-established Exchanges and the federal Exchange to be treated similarly for the purpose of tax credits is confirmed by an earlier draft of the bill. In earlier drafts of bills in both the House of Representatives and the Senate, Congress used clear language that would have extended tax credits to individuals enrolled through the federal Exchange. H.R. 3962, 111th Cong., § 308(e) (2009) (Providing for one federal Exchange and, if states decided to create an Exchange "references . to the Health Insurance Exchange . . shall be deemed a reference to the State-based Health Insurance Exchange."); *see also* S. 1679, 111th Cong, §§ 3104(d); 3111(b) (2009) (providing that the Secretary shall establish a federal "gateway" if a state does not establish a "gateway" and providing for tax credits for all gateways.). That language, however, was removed prior to passage of the ACA. When Congress discards language from an earlier draft of a bill, courts assume that the enacted law should not be read to include the deleted language. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" (quoting *Nachman Corp. v. Pension Benefit Guaranty*

Corporation, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting))); *cf. Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); *Russello*, 464 U.S. at 23. If Congress intended to provide tax credits to those enrolled through the federal Exchange, then it would have included the language from an earlier draft of the bill. Therefore, that Congress removed language extending tax credits to individuals enrolled through the federal Exchange further demonstrates that the ACA is not ambiguous regarding tax credit eligibility. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (internal quotation omitted)).

Finally, contrary to the suggestion made in Judge Davis's concurring opinion below, the Petitioners do not need to support their position with legislative history. *King v. Burwell*, 759 F.3d 358, 378 (4th Cir. 2014) (Davis, J., concurring). Legislative history has a limited value when construing the meaning of a statute, and can only overcome the plain language of the statute in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 149 (1984) ("[T]he legislative purpose is expressed by the ordinary meaning of the words used."). This is not the case here, as no legislative history demonstrates that Congress intended to extend tax credits to individuals enrolled through the

federal Exchange. *See* Brief of Petitioners, Part I.D.1.c.; *King*, 759 F.3d at 371 (stating that the legislative history is "somewhat lacking").

In fact, the challenged regulations likely frustrate the "intentions of [the] drafters." *Griffin*, 458 U.S. at 571. The plain language of the ACA demonstrates that Congress intended for states to set up Exchanges. 42 U.S.C. § 18031(b)(1) (providing that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State"). It is axiomatic, however, that Congress cannot require states to implement federal laws. *Printz v. United States*, 521 U.S. 898, 904-05, 935 (1997). Therefore, Congress likely included the tax credits to encourage states to establish Exchanges. *See N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (Congress legislates with this Court's decisions as a backdrop). This is reflected in the statements of one of the ACA's key architects, Prof. Jonathan Gruber:

> [I]f you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits. I hope that that's a blatant enough political reality that states will get their act together and realize that there are billions of dollars at stake here in setting up these Exchanges, and that they'll do it.

Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), https://www.youtube.com/watch?v=GtnEmPXEpr0&feature=youtu.be&t=31m25s.

As the foregoing demonstrates, Congress's intent is clear: tax credits may not be provided to individuals enrolled through the federal Exchange. "[T]hat is the end of the matter; for [a] court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *see Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."). Accordingly, this Court should reverse the decision of the Fourth Circuit and hold unlawful and set aside the IRS regulations.

II. EVEN IF THE STATUTORY TEXT WERE AMBIGUOUS, CONGRESS DID NOT INTEND TO DELEGATE TO THE IRS THE ISSUE OF TAX CREDIT ELIGIBILITY.

As demonstrated above, the text of the ACA clearly prevents the IRS from extending tax credits to those enrolled through the federal Exchange. Even if the statutory language were ambiguous, however, the IRS may only resolve that ambiguity if Congress intended to delegate that authority to the agency. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (holding that ambiguous statutory language did not constitute a Congressional delegation of authority). "In extraordinary cases," like when the legal question before the Court is an important one, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation" of authority to an agency as a

result of statutory ambiguity. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986), for the proposition that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration")).[2] *Id.* A court should not necessarily presume the Congress intended to delegate authority to an agency and "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)). Therefore, if this Court finds the language of the ACA ambiguous, it must analyze whether Congress intended the IRS to resolve the tax credit eligibility issue. *Id.*; *see also City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring) ("I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the

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[2] Although the Fourth Circuit recognized "that not every ambiguity in a statute gives rise to *Chevron* deference," it failed to analyze whether the purported ambiguity in this case reflected a Congressional intent to delegate to the IRS the authority to determine tax credit eligibility. *King*, 759 F.3d at 373 n.4. To make matters worse, the Fourth Circuit simply presumed that Congress delegated the authority to the IRS to make this major policy decision. *Id.* Yet, as demonstrated below, that the issue is a major policy decision demonstrates that Congress did not intend to delegate policy-making authority to the IRS.

agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant."); *id.* at 1877 (Roberts, C.J., dissenting) ("A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1538 (2009) ("[T]o shift interpretive authority to an agency is to presume, as a matter of law, that a delegation occurred and to relieve the courts of determining whether, in fact, such a delegation occurred."). The nature of the tax credit provision demonstrates that Congress did not implicitly delegate to the IRS the authority to determine tax credit eligibility.[3]

There are several factors that indicate that Congress intended to delegate policy-making authority to an agency: the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time. *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Stating that those factors "indicate that *Chevron* provides the appropriate

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[3] As demonstrated by Petitioners, Congress did not even expressly delegate to the IRS the authority to administer the ACA provisions at issue. Brief of Petitioners, Part II.C. As a result, it is unlikely that Congress implicitly delegated any authority.

legal lens through which to view the legality of the Agency interpretation here at issue."). In this case, these factors indicate that Congress did not intend to delegate the issue of subsidy eligibility to the IRS.

First, Congress does not often delegate major policy issues to agencies, as it does with interstitial matters. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 147. At a minimum, "Congress [must] speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160); *cf. Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983) ("[D]eference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." (citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)). In this case, the issue of tax credit eligibility has vast economic and political significance because it affects billions of dollars of potential tax credits. Brief of Petitioners, Part II.A. Furthermore, the issue is not an interstitial matter because tax credit eligibility is a major aspect of the ACA. *King*, 759 F.3d at 373 n.4 (stating the importance of tax credits to the overall statutory scheme of the ACA). Therefore, Congress did not delegate policy-making authority on the issue to the IRS. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 147.

Secondly, the nature of the policy question of tax credit eligibility is not a question related to the expertise of the IRS. *See Walton*, 535 U.S. at 222 (Stating that "related expertise of the Agency" is a factor in deciding whether to defer to agency's interpretation). Congress often delegates policy-making authority to an agency when a policy decision requires expert knowledge. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). The policy question at issue is not how eligible individuals may receive the tax credit or how the amount of the tax credit is calculated, issues that are arguably within the IRS's expertise. Instead, the issue in this case is the class of individuals who are eligible for the tax credit.[4] 26 U.S.C. § 36B(a) (providing for tax credits to

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[4] The distinction between the hypothetical issues and the actual issue in this case also demonstrates that the issue before the Court is not "importa[nt] . . to administration of the statute" nor will the Court's resolution of the issue affect the "complexity of that administration." *Walton*, 535 U.S. at 222. The IRS's administration of the tax credit provision of the ACA is not going to be significantly different if this court holds that only those enrolled through State-established Exchanges are eligible for tax credits. The IRS's method of calculating tax

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"applicable taxpayer[s]"); 26 U.S.C. § 36B(c) (defining "applicable taxpayer"); *see also* Question Presented, *supra*. As demonstrated above, the plain language of the ACA proves that Congress made that major policy decision itself. Thus, contrary to the decision of the Fourth Circuit, there was no delegation of authority to the IRS. As a result, no deference should be accorded to the IRS's interpretation. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159; *Walton*, 535 U.S. at 222.

In fact, this Court is in a better position than the IRS to determine Congressional intent. Statutory interpretation is an area where the judiciary has more experience and expertise than any administrative agency:

> [C]ourts have a large fund of experience with statutes and such experience makes them uniquely qualified for this important task. If there is one thing that judges are good at, and have a lot of practice in, it is construing statutes. Judges are routinely presented with cases whose outcomes turn on bread-and-butter questions of statutory interpretation.

The Honorable Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 Am. U. L. Rev. 1, 8 (1986); *see also* Sales & Adler, *supra*, 2009

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credits under the ACA will remain the same. All that will be different is who is eligible to receive those tax credits.

U. Ill. L. Rev. at 1536 ("However imperfect judicial decisions may be, they are more likely to reflect the faithful application of precedent, applicable legal norms, and canons of construction than equivalent decisions made by agencies headed by executive officials.").

Drafting legislation requires many compromises, and the text of the statute reflects those compromises. *Sigmon Coal Co.*, 534 U.S. at 461 (A statute's "delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions."); *see also Halbig v. Burwell*, 758 F.3d 390, 402 (D.C. Cir. 2014), *reh'g en banc granted, judgment vacated,* No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014)[5] ("The Constitution assigns the legislative power to Congress, and Congress alone and legislating often entails compromises that courts must respect."). While an agency may have some knowledge of the Congressional deal making, the "ultimate deal struck is unlikely to match the legislative proposal advanced by the agency, nor is an agency's interpretation likely to be immune from the agency's perceived self- interest." Sales & Adler, *supra*, 2009 U. Ill. L. Rev. at 1536-37. Therefore, if the Act is ambiguous, this Court should determine who Congress intended to extend

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[5] *Halbig* also involved a challenge to the IRS regulations extending tax credits to individuals enrolled through the Federal Exchange. 758 F.3d 390.

tax credits to, without deferring to the IRS.[6] Doing so will result in a decision that reflects the policy decision made by Congress. As demonstrated above, Congress intended to only extend tax credits to individuals enrolled through State-established Exchanges. Accordingly, this Court should reverse the decision of the Fourth Circuit.

III. THIS COURT SHOULD ENSURE THAT THE EXECUTIVE BRANCH DOES NOT EXCEED ITS CONSTITUTIONAL AUTHORITY.

The text of the ACA clearly provides that Congress intended to only extend tax credits to individuals enrolled through State-established exchanges. *Oklahoma ex rel. Pruitt v. Burwell*, No. CIV-11-30-RAW, 2014 WL 4854543, at *6 (2014). If this Court allows the IRS to rewrite the ACA and ignore Congressional intent, it will threaten the proper balance

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[6] There is no concern that this Court will substitute its policy judgment for that of Congress in this case. *See Chevron*, 467 U.S at 865–66 (noting concern with judges making decisions based on personal policy preferences). As demonstrated above, when a court properly applies canons of statutory interpretation it can ensure that the decision reflects the intent of Congress. *See* Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. Chi. L. Rev. 329, 359-60 (2007) "[I]t is possible for normative canons to be policy-based without resting entirely on policy judgments made by courts. Some normative canons, although developed and articulated by judges, are designed to guide the resolution of ambiguities toward outcomes that reflect values gleaned from the federal Constitution or from our legal system as a whole.").

of power between the three branches of government. An executive agency cannot usurp either Congress's legislative power or this Court's judicial power. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446 (2014) ("The power of executing the laws does not include a power to revise clear statutory terms. . "). If this Court defers to the IRS's interpretation of the ACA, it will allow the agency to usurp both.

The Framers of the Constitution created separate, co-equal branches of government because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 244 (J. Madison) (Buccaneer Books 1992). Therefore, to protect individual liberty, the framers created a system that placed specialized powers in each of the three branches of government. The Federalist No. 78, at 394 (A. Hamilton) (Buccaneer Books 1992) ("'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" (quoting Montesquieu, *Spirit of Laws, Vol. 1*)); Philip Hamburger, *Is Administrative Law Unlawful?* 325 (2014) (Arguing that the "separation of powers" in the Constitution was "a matter of distinguishing the three specialized powers of government and vesting each in its own specialized part of government.").

While this Court has held that Congress can delegate some legislative authority to an agency, it has always ensured that it is Congress making the decision to delegate. *Louisiana Pub. Serv. Comm'n v.*

FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act unless and until Congress confers power upon it."). In this case, Congress decided who was eligible for tax credits and used clear statutory language to reflect that major policy decision. If deference is accorded to the IRS in this case, then it is difficult to imagine a situation in which Congress could ever effectively limit an agency's ability to rewrite a statute to suit its own self-serving purposes. Accordingly, this Court must ensure that the legislative power remains solely with Congress by holding unlawful the IRS's attempt to arrogate this power to itself. *United States v. Taylor*, 487 U.S. 326, 336 (1988) ("[Judicial] review must serve to ensure that the purposes of [an] Act and the legislative compromise it reflects are given effect.").

Like the legislative power, the Constitution vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This power:

> [C]an no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

United States v. Nixon, 418 U.S. 683, 704 (1974); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Therefore, the Constitution requires that the judiciary be the ultimate authority on issues of statutory construction. *Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent"); 5 U.S.C. § 706 (Administrative Procedure Act providing that "the reviewing court shall decide all relevant questions of law. .); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239, 1285 (2002). ("[A]llowing administrators to interpret statutes and to define their powers free from judicial review is precisely the sort of arrangement that the constitutional separation of powers was designed to prevent."); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. Rev. 757, 803 (1991) ("In order to maintain the checks and balances inherent in our constitutional framework, judicial review of article I adjudications must exist and independent review of questions of law must be permitted.").

The Fourth Circuit, however, relinquished its judicial power to the IRS by failing to interpret the plain language of the statute itself. *See City of Arlington*, 133 S. Ct. at 1873 (It is a court's responsibility to

"tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority."); Molot, *supra*, 96 Nw. U. L. Rev. at 1278 (2002) (If judges were to relinquish "final authority on issues of statutory construction" to administrators this would upset the Constitution's careful allocation of political power.").

The concerns of agency overreach are not unfounded. The growing power of the administrative state has resulted in the concentration of legislative, executive, and judicial powers in unelected administrative agencies. *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting) ("Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power. . executive power and judicial power. . The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government."). In order to ensure that the constitutional plan is not eroded, this Court must take its judicial role seriously and ensure that "deference is not to be a device that emasculates the significance of judicial review." *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 142-43 (1984). No deference should be accorded to the IRS's interpretation, and this Court should hold that the ACA does not allow the agency to extend tax credits to individuals who are enrolled through the federal Exchange. Therefore, to ensure that an agency does not invade the purview of the

judiciary by interpreting a statute contrary to the plain meaning of its language, this Court should reverse the decision of the Fourth Circuit.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

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Respectfully submitted,

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